THE PAN-AMERICAN ARBITRATION TREATY

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INTRODUCTION

DURING the first regular session of the 71st Congress of the United States, which convenes early in December, the Senate will be called upon to consider the ratification of the Inter-American Arbitration Treaty signed by twenty American States on January 5, 1929. This treaty is one of two multilateral agreements providing for pacific settlement of all international disputes drafted by the International Conference of American States on Conciliation and Arbitration, which met in Washington from December 10, 1928 to January 5, 1929. The first treaty—that on conciliation—was ratified by the Senate without debate on February 20, 1929, but the second was not reported by the Senate Foreign Relations Committee before the close of the 70th Congress.

Both treaties are logical corollaries to the condemnation of war as an instrument of national policy—a principle contained not only in the anti-war pact but also in the resolution adopted at the Sixth Pan-American Conference held at Havana in 1928. Moreover, both treaties supplement the anti-war pact by providing the necessary machinery for settlement of disputes by peaceful means. Mr. Hughes, the American delegate at the conference, said, "We consider this treaty as a notable advance in the development of peaceful settlement. It is quite obvious that it is not sufficient to renounce war, unless we are ready to have recourse to the processes of peace."[1]

This report reviews briefly the provisions of both treaties, with special emphasis on the arbitration pact, which still awaits the approval of the Senate. Finally the reluctance of the Senate to ratify compulsory arbitration agreements is briefly discussed, and its insistence that in each case, before arbitration of a particular dispute is undertaken, the special agreement defining the terms of reference must first be submitted to the Senate for its consent.

ARBITRATION TREATIES BEFORE 1929

The extent to which Central and South American States have accepted the principle of arbitration with each other and with the United States has been reviewed at length in a previous issue of the *Information Service*.[2] It is unnecessary, therefore, to trace the arbitration record of the United States and the several Latin American countries, beyond indicating the chief advances made prior to 1928. In general, it may be said that the principle of arbitration has nowhere received more wholehearted support than on the American continents. The constitutions of three Latin American republics —Brazil, Venezuela, and the Dominican Republic—provide for the submission of all international disputes to arbitration before resorting to war. Many bilateral arbitration treaties have been signed by Latin American countries, and thirty-six such treaties were in effect in 1928.[3] Eleven of these agreements are compulsory arbitration treaties in the truest sense of the term, and except no disputes whatsoever from arbitration.[4] The United States, however, has so

1. *Proceedings of the International Conference of American States on Conciliation and Arbitration, held at Washington, December 10, 1928, to January 5, 1929* (hereafter referred to as *Proceedings*), p. 610.

2. F. P. A. *Information Service*, Vol. 4, No. 17, "Arbitration on the American Continent."

3. James Oliver Murdock, *Latin-American Commission of Inquiry and Arbitration Treaties, Summaries and Tables, June 1928*, in Department of State Library; also F. P. A. *Information Service*, Vol. 4, No. 17, cited, p. 355.

4. *Ibid.*

far been reluctant to conclude compulsory arbitration treaties. At the present time five of the arbitration treaties negotiated by Secretary of State Root in 1908-1909 are the only ones in force between the United States and Latin American republics;[5] these treaties except from arbitration disputes affecting vital interests, independence, sovereignty, national honor, or the interests of third States.

Projects for arbitration of inter-American disputes have been discussed at each of the six Pan-American conferences held since 1889, but until the Havana conference in 1928 little progress was made toward adopting an inclusive compulsory arbitration convention. Projects for compulsory arbitration treaties initiated at the first and second conferences failed of adoption, and were consequently abandoned. The most important step actually taken was the adoption at the second conference, held at Mexico City in 1902, of a treaty for the arbitration of pecuniary claims.[6] The life of the Pecuniary Claims Convention was extended at the third Pan American conference held at Rio de Janeiro in 1906, and again at the fourth conference at Buenos Aires in 1910. A general conciliation treaty providing for commissions of inquiry was signed at the fifth conference in Santiago in 1923. It is this treaty, known as the Gondra Treaty, which has been supplemented by the Inter-American Conciliation Treaty signed at the conference in Washington on January 5, 1929. At the time of the Sixth Pan American Conference at Havana in 1928, therefore, the only two general multilateral treaties in force between the American republics were the Pecuniary Claims Convention and the Gondra Conciliation Treaty. The United States was also a party to the Treaty for the Establishment of International Commissions of Inquiry, signed at Washington February 7, 1923, with the five Central American countries.

Plans for a general American arbitration and conciliation treaty were first discussed by the American Institute of International Law in 1924.[7] In 1927 the International Commission of Jurists, meeting at Rio de Janeiro, prepared a project for pacific settlement of international disputes which embodied virtually all methods of peaceful settlement, including the exercise of good offices, mediation and conciliation.[8] This project was referred to the Sixth Pan-American Conference at Havana, and was discussed in the Second Commission at that conference. Mr. Alfaro, the delegate of Panama, who was appointed reporter of this commission, presented his report on February 2. As the project of the Commission of Jurists was confined to conciliation and made no suggestions whatever in regard to arbitration, Mr. Alfaro, in his own report, proposed the acceptance of the principle of obligatory arbitration, with the minimum exceptions necessary to safeguard the independence and the constitutions of States.

The Alfaro report was not discussed, however, until February 16, a few days before the conference was to adjourn. Lacking the time necessary to draft complete arbitration and conciliation treaties, the conference decided to postpone the question and to refer it to a conference to be held in Washington within one year. Accordingly, on February 17, 1928,[9] a resolution based on a declaration condemning war as an instrument of national policy was adopted, the text of which is as follows:

> RESOLUTION: The Sixth International Conference of American States resolves:
>
> WHEREAS: The American Republics desire to express that they condemn war as an instrument of national policy in their mutual relations; and
>
> WHEREAS: The American Republics have the most fervent desire to contribute in every possible manner to the development of international means for the pacific settlement of conflicts between States:
>
> 1. That the American Republics adopt obligatory arbitration as the means which they will employ for the pacific solution of their international differences of a juridical character.
>
> 2. That the American Republics will meet in Washington within the period of one year in a

5. These are treaties with Brazil, Ecuador, Haiti, Peru and Uruguay.

6. Nineteen American republics have ratified or adhered to the Hague Convention of 1899; ten have ratified or adhered to the Hague Convention of 1907. Cf. James Brown Scott, *Hague Conventions and Declarations of 1899 and 1907*, p. 230-39.

7. *Codification of American International Law, Projects of Conventions Prepared at Request of Governing Board of Pan American Union*, Washington, 1925, p. 119-21.

8. Pan American Union, *International Commission of Jurists, Rio de Janeiro Session, April 18, 1927, Public International Law*, 1927, p. 36-40; cf. also F. P. A. *Information Service*, Vol. IV, No. 4, "The Sixth Pan American Conference," p. 73.

9. *Report of the Delegates of the United States of America to the Sixth International Conference of American States, Washington*, p. 26.

conference of conciliation and arbitration to give conventional form to the realization of this principle, with the minimum exceptions which they may consider indispensable to safeguard the independence and sovereignty of the States, as well as matters of a domestic concern, and to the exclusion also of matters involving the interest or referring to the action of a State not a party to the convention.

3. That the Governments of the American Republics will send for this end plenipotentiary jurisconsults with instructions regarding the maximum and the minimum which they would accept in the extension of obligatory arbitral jurisdiction.

4. That the convention or conventions of conciliation and arbitration which may be concluded should leave open a protocol for progressive arbitration which would permit the development of this beneficent institution up to its maximum.

5. That the convention or conventions which may be agreed upon, after signature, should be submitted immediately to the respective governments for their ratification in the shortest possible time.

The task assigned to the conference which met in Washington on December 10, 1928, was thus clearly set forth in the Havana resolution. It was to prepare treaties of arbitration and conciliation with the minimum exceptions considered indispensable to safeguard the independence and sovereignty of States, while excepting also matters of domestic concern and matters involving third States. Twenty of the twenty-one American States appointed representatives to participate in the conference, Argentina alone declining to take part.

Four plenary meetings were held between December 10, 1928 and January 5, 1929, when the two treaties and a Protocol of Progressive Arbitration were signed. At the opening session the conference established two committees—one to draft the conciliation treaty, the other to draft the arbitration treaty and the Protocol of Progressive Arbitration.[10] Each country was represented on both committees. Three plenary sessions were held by each committee, while smaller sub-committees were appointed to do the actual work of drafting the conventions. The discussions which took place in the sub-committees were held in private; the minutes have not been published in the proceedings of the conference.

THE INTER-AMERICAN CONCILIATION CONVENTION

The two treaties of conciliation and arbitration signed at Washington together provide complete machinery for dealing with international disputes of whatever nature. While they are considered separately in this report, they are mutually supplementary and are designed to operate in complete harmony with each other.

The process of arbitration is limited to questions of a juridical nature, susceptible of decision on the basis of principles of international law.[11] Conciliation, on the other hand, may be employed for the adjustment of any controversies which the parties have been unable to settle through diplomacy, and is not necessarily limited to questions of law. In its broadest aspects, the process of conciliation may include the use of good offices, mediation, investigation and report. The Bryan treaties concluded by the United States in 1913 and 1914 with twenty-one countries, including nine Latin American States, provide for submission of all disputes which it has not been possible to settle by diplomacy to investigation and report by permanent international commissions. The parties agree not to resort to war or begin hostilities during the period of investigation and report.[12] Separate commissions are provided for in each case by the Bryan treaties.

The multilateral treaty of 1923 between the United States and the five Central American States provided for the setting up of *ad hoc* commissions of inquiry, in regard to disputes except those affecting sovereignty, independence, vital interests and national honor.

THE GONDRA TREATY

Until the signing of the present conciliation treaty in Washington, the most inclusive multilateral treaty in force between American States was the Treaty to Avoid or Prevent Conflicts Between American

10. *Proceedings*, p. 50.

11. Cf. F. P. A. *Information Service*, Vol. IV, No. 17, cited, p. 345.

12. Cf. W. M. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776—1923*, "Treaty with France," Vol. III, p. 2587; cf. also F. P. A. *Information Service*, Vol. III, No. 7, "International Arbitration and Plans for an American Locarno."

States, signed at Santiago May 3, 1923, and known as the Gondra Treaty.[13] The Gondra Treaty provided for submission of all controversies to a commission for investigation and report, except disputes involving constitutional questions of States which have no general treaties of arbitration. The three senior diplomatic officers accredited by American States to Washington and to Montevideo (Uruguay) were designated as members of two permanent committees, whose sole function was to call a special commission of inquiry whenever requested to do so by one or more parties to the treaty, and to notify the other parties concerned. Each party would then appoint two members to the commission, only one of whom, however, could be a national of the appointing power. The four members thus chosen would select a president from a neutral State.

The Gondra Treaty had been ratified by fifteen States[14] by December 1928 when the Conference on Arbitration and Conciliation met in Washington. Recognizing both the difficulty of securing universal adoption of a multilateral treaty and the value of many features of the existing treaty, the conference decided not to scrap the Gondra Treaty but merely to strengthen it by drafting a supplementary conciliation treaty.

The greatest weakness of the Gondra Treaty, in the view of the delegates to the Washington conference, arose from the fact that the two diplomatic committees were not given the power to use their good offices in bringing together the parties to a dispute. The boundary controversy between Bolivia and Paraguay, which threatened to bring these two countries to war at the very time the conference met in Washington, served to emphasize this weakness. Paraguay requested the diplomatic body at Montevideo to organize a commission of inquiry, but Bolivia declined to name members for such a commission, on the ground that the Gondra Treaty had not yet been approved by the Bolivian legislature. Even if the legislature had ratified the treaty, long negotiations would have been necessary to establish the commission, and at a time when the feelings of both parties were at fever heat. Meanwhile the diplomatic committee had no power to effect mediation and was neither willing nor able to invoke an international commission.

13. U. S., Department of State, *Treaty Series*, No. 752.

14. The United States, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Guatemala, Haiti, Mexico, Panama, Paraguay, Peru, Salvador, Uruguay and Venezuela.

THE CONVENTION OF 1929

In order to remedy this defect, the Pan American Arbitration Conference provided in Article 3 of the conciliation convention that the diplomatic committees at Washington and Montevideo should be "bound to exercise conciliatory functions, either on their own motion when it appears that there is a prospect of disturbance of peaceful relations, or at the request of a party to the dispute" until the *ad hoc* commission is established.

Explaining the reason for including this provision in the conciliation convention, Mr. Varela of Uruguay, the reporting delegate in the Conciliation Committee, said:

> "In the desire to further the conciliation of the parties at any time, the draft confers conciliatory functions on the permanent commissions created by the Gondra Treaty, taking into account that between the closing of diplomatic channels and the constitution of the commission of inquiry a more or less long period of time might transpire, which is, perhaps, the most dangerous period for grave conflicts to arise between the parties in dispute. At that opportune moment, therefore, its conciliatory action will be carried out. . . ."[15]

Serious doubts were apparently expressed in the private meetings of the conference by a number of delegates who feared that if the committees were given conciliatory powers they might inject themselves unnecessarily into the ordinary conduct of diplomatic relations between two States.[16] The objections were removed by inserting the clause in Article 3, already quoted, which limits the action of the permanent committees to cases in which it appears that there is a prospect of disturbance of peaceful relations.

In addition to investigating the facts of a dispute and making a report, as under the Gondra Treaty, the commission of inquiry under the 1929 convention has the character of a commission of conciliation. As Mr. Varela pointed out in his report, the treaty

15. *Proceedings*, p. 290-91.

16. *Ibid.*, p. 292.

authorizes investigation commissions "to proceed, as organs of conciliation, at any moment after their organization, that is to say, before investigation, during it, or finally after the investigating procedure has been closed." In other words, if in the process of uncovering the facts the investigating commission finds it possible to settle the whole matter finally and amicably between the parties, it is entirely free to do so. One year is allowed for investigation, and an additional period of six months is permitted for the parties to pass on the bases of settlement which may be recommended.[17]

The conciliation convention makes no reservations whatever as to types of disputes to which it may be applied and eliminates the single reservation of the Gondra Treaty with respect to disputes affecting constitutional provisions of countries not having general arbitration treaties.

EFFECTS OF THE CONVENTION

The reports or recommendations of the investigating commission do not have the character of decisions or arbitral awards,[18] and are not binding on the parties. Their force rests entirely upon the weight which a report from an impartial international commission is bound to have on public opinion. But inasmuch as the parties to the conciliation convention of 1929 must also be adherents to the Gondra Treaty, they are obliged to refrain from any warlike acts, such as mobilization of troops or other preparations for hostilities, until the commission has rendered its report. In the event of the commission's failing to bring about an agreement, those American States which are members of the League are obliged in accordance with Article 15 of the Covenant to place the dispute, if it threatens to lead to hostilities, before the League Council at Geneva. States which have ratified the anti-war pact, moreover, cannot go to war, even in the event of failure of conciliation, unless the war is one of "self-defense." Possibly the question as to which of two States has violated the anti-war pact would be treated as one of the legal disputes which must be referred to arbitration under the Inter-American Arbitration Convention.[19]

The broad character of the Inter-American Conciliation Convention gives it a special value inasmuch as it provides machinery for peaceful adjustment which is automatically set in motion at the moment when a dispute threatens to disturb peaceful relations. If the new conciliation convention had been in force in 1927-1928 the diplomatic committee either at Montevideo or at Washington would have had the right to intervene in the land and oil law dispute between the United States and Mexico in an effort to bring about conciliation. The permanent committees would not necessarily be deterred from acting in a case where the diplomatic agent of one of the parties to a dispute happened to be a member of a committee. The treaty specifically provides that the committees may act by majority vote.

The United States was the first country to ratify the Inter-American Conciliation Convention. It was proclaimed on April 4, 1929, after the Senate had consented to ratification on February 20 without debate.[20] Apparently because of opposition to certain provisions of the arbitration treaty, and the lack of time for debate in the closing days of the 70th Congress, the Senate Foreign Relations Committee failed to report the latter agreement.

THE INTER-AMERICAN ARBITRATION TREATY

The arbitration treaty, by virtue of its precise definition of what constitutes a judicial question, and its omission of sweeping exceptions, embodies the most advanced principles of compulsory arbitration. It is more precise than the series of treaties concluded with France and other non-American countries during 1928 by Secretary Kellogg,[21] and is far more inclusive than the Root treaties concluded in 1908 and 1909. The arbitration treaty incorporates many features embodied in recent European arbi-

17. Article 10.

18. Article 9.

19. Cf. p. 319.

20. *Congressional Record*, February 20, 1929 (Legislative day February 15). Only two other governments, Mexico and the Dominican Republic, had deposited their ratifications by October 30, 1929.

21. U. S., Department of State, *Treaty Series*, No. 785, "Treaty between the United States and France, Arbitration." For text of Inter-American Arbitration Treaty, cf. Appendix, p. 326.

tration treaties, the Locarno agreements and the statute of the Permanent Court of International Justice. Moreover, the Protocol of Progressive Arbitration makes it possible for any party to the treaty to abandon in whole or in part exceptions in the treaty or reservations which they may have made, without the necessity of negotiating a new treaty. In this way, as States withdraw their reservations, the scope of the treaty will be progressively extended.

The scope of the arbitration treaty, supplementing the conciliation convention, is defined in Article 1. The parties bind themselves to submit to arbitration "all differences of an international character which have arisen or may arise" between them "by virtue of a claim of right made by one against the other under treaty or otherwise which it has not been possible to adjust by diplomacy and which are juridical in their nature by reason of being susceptible of decision by the application of the principles of law." Among the questions which are to be arbitrated are those which fall within the following categories:

(a) The interpretation of a treaty.
(b) Any question of international law.
(c) The existence of any fact which, if established, would constitute a breach of an international obligation.
(d) The nature and extent of the reparation to be made for the breach of an international obligation.

No treaty to which the United States is a party has ever been so specific in defining exactly what types of question are suitable for arbitration. The four categories, which were taken from Article 36 of the statute of the Permanent Court of International Justice, include virtually every type of juridical question.

TREATY INTERPRETATION

Questions affecting the interpretation of treaties have been a frequent cause of serious international controversy. In Latin America, in particular, many boundary disputes arising from conflicting interpretations of treaties or deeds have led to war or prolonged and bitter controversy. The Tacna-Arica dispute between Chile and Peru, which was not finally settled until this year, arose in part out of a difference of interpretation of the Treaty of Ancon, signed October 20, 1883. To cite a current case, contrary interpretations of the treaty of 1903 between the United States and Panama,[22] involving questions as to the degree of jurisdiction exercised by the United States in the Canal Zone, have existed almost from the time of the ratification of the treaty and have in recent years attracted special attention.[23]

Differences of opinion have arisen over the interpretation particularly of Article 3 of the Treaty of 1903. This article states that

> ". . . the Republic of Panama grants to the United States all the rights, power and authority within the zone mentioned and described in Article II of this agreement and within the limits of all auxiliary lands and waters mentioned and described in said Article II which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority."

In negotiating a new convention, finally signed on July 28, 1926, but as yet unratified, Panama contended that the United States had no right to engage in commercial activities in the Canal Zone beyond what was necessary for the purpose of constructing, operating and protecting the canal.[24] The United States, however, declined to accept this limited view.[25]

At the Eighth Assembly of the League of Nations Dr. Morales, the Panama delegate, referred to this difference in interpretation and said that Panama hoped that the United States would eventually concur in its view.

> "If this is not the case, however," he added, "the two nations would still be able to submit this and any other dispute to an impartial court of justice for its decision, trusting that a correct and equitable interpretation would be given for all time.
>
> "The United States has always been a just country, a lover of peace and an enthusiastic supporter of international arbitration. It is un-

22. Malloy, cited, Vol. II, p. 1349.

23. For a fuller discussion of this subject cf. F. P. A. *Information Service*, Vol. III, No. 23, p. 358, "Mexico, the Caribbean and Tacna-Arica."

24. *Ibid.*, p. 357.

25. Differences of interpretation have also arisen out of the permanent treaty of May 22, 1903 between the United States and Cuba embodying the Platt amendment, and out of the treaty of September 1915 between the United States and Haiti.

thinkable, therefore, that in a dispute with a small, weak country, it should refuse to submit to impartial judges a matter arising out of the interpretation of the treaty, and still more unthinkable that it should attempt to impose its own interpretation by some extra-judicial means."[26]

The opinion has prevailed among a group of United States Senators that to arbitrate these differences with Panama would, in effect, mean arbitrating the question of the sovereignty of the Panama Canal Zone. Consequently, they are opposed to the arbitration of any questions arising out of the Panama treaty. It is pointed out, however, that the rights of the United States rest upon a treaty between two legally equal powers; the question at issue, moreover, does not affect the fundamental position of the United States with respect to the canal, but merely the question of whether or not its rights extend beyond whatever maintenance and defense are necessary for the operation of the canal.

SUBJECTS EXCEPTED FROM ARBITRATION

Only two general exceptions are written into the Inter-American Arbitration Treaty. These are contained in Article 2, and refer to the following types of controversy:

(a) Those which are within the domestic jurisdiction of any of the parties to the dispute, and are not controlled by international law;
(b) Those which affect the interest or refer to the action of a State not a party to the treaty.

The Root treaties limited arbitration to "differences which may arise of a legal nature or relating to the interpretation of treaties," provided that they do not affect "the vital interests, the independence or the honor of the two contracting states, and do not concern the interests of third states." Each State was to be the judge of whether a given dispute fell within the exempted categories. It could therefore withdraw from arbitration practically any dispute which it was afraid to submit. The recent arbitration treaties with France and Germany marked an advance over the Root treaties by eliminating the phrases "vital interests" and "national honor." But four specific categories of dispute are excepted from arbitration by all the Kellogg treaties:

(a) Questions within the domestic jurisdiction of either of the parties;
(b) Questions involving the interests of third parties;
(c) Questions involving the Monroe Doctrine;
(d) Questions involving the obligations of the other States in accordance with the Covenant of the League of Nations.

The Inter-American Arbitration Treaty makes a further advance. It limits the traditional reservation regarding "domestic questions" (see *a* above) by adding the clause "and not controlled by international law." In discussing this reservation at the conference in Washington, Mr. Hughes, the United States delegate, said:

"When we say in the first exception: 'and are not controlled by international law,' we have obvious reference to those situations in which matters which would otherwise fall within the domestic jurisdiction have, by reason of an international transaction, another treaty, for example, become the subject of international consideration because they impart international obligation."[27]

The intent and meaning of the second reservation, which refers to the rights of third parties, was questioned during the discussion of the draft in the Arbitration Committee by Mr. Grisanti, of Venezuela, who said:

"It is evident that the controversies which affect the interests of a nation not a party to the treaty are not arbitrable . . . by virtue of the principle *res inter alios acta, aliis neque nocere neque prodesse potest.*[28] This seems so obvious, that it is useless to stipulate it, because however well the exception is expressed at all, the third state will never be bound by the arbitral award.

"On the other hand, it is not clear what is meant by the phrase 'or to the action of a state not a party to the treaty.' If the 'action' of this third state is confused with its 'interest' the same *inelegentia juris* above mentioned is encountered; if it is not, it is necessary to express clearly what is to be understood by the word 'action.' The delegation of Venezuela would appreciate some explanation of this point."[29]

Mr. Hughes of the United States delegation replied, but did not clear up the point raised in the last part of the question:

"I appreciate the point which my distinguished friend from Venezuela has made with respect

26. League of Nations, *Official Journal*, "Records of the Eighth Ordinary Session of the Assembly," Special Supplement 54, p. 100-103.

27. *Proceedings*, p. 612.

28. Agreements made between certain parties can neither injure nor benefit other parties.

29. *Proceedings*, p. 603.

> to the award not being binding on third states. That, of course, is true. But if a third state has an interest in a controversy, or if the action of the third state is to be the subject of discussion, it is manifest that there ought not to be an arbitration which draws in that interest or action even though the award might not be binding upon the third state. That is an historical exception which has always been made because it has been recognized that those disputes or controversies . . . cannot properly be made the subject of arbitration."[30]

The question might be raised as to whether this exception would have prevented reference to arbitration of the Tacna-Arica dispute between Chile and Peru, by virtue of the "interest" claimed by Bolivia. It should be noticed that the article excludes merely disputes "which affect the interest or refer to the action of a State *not a party to this treaty.*" Two States could therefore resort to arbitration even though the dispute affected the interest of a third State, if that third State was also a party to the treaty.

ARBITRATION AND THE MONROE DOCTRINE

It is noteworthy that the United States delegation did not make any reservation to the Inter-American Arbitration Treaty with reference to the Monroe Doctrine. If the treaty is ratified, the United States will accordingly agree to submit to arbitration legal disputes with other American countries regardless of the Monroe Doctrine. It does not agree, however, to arbitrate under this treaty disputes affecting the Monroe Doctrine if such disputes involve European countries (or third States which are not parties to the treaty).

Mr. Charles Evans Hughes has pointed out that in the course of the discussions at the conference in Washington, the Monroe Doctrine was not mentioned. "The treaty," he said, "makes no reference to it and the reason is obvious. The treaty is between the American Republics. The Monroe Doctrine may be summarized as being opposed (1) to any non-American action encroaching upon the political independence of American states under any guise; and (2) to the acquisition in any manner of the control of additional territory in this hemisphere by any non-American power. It thus relates to the interests or the action of a non-American state and such states are not parties to the treaty and would not be parties to an arbitration under the treaty. Matters affecting their interests or referring to their action fall within the exception of the treaty relating to third parties."[31]

ARBITRATION COURTS

Under the optional clause of the World Court Statute, if two States disagree as to whether or not a given dispute falls within the classes subject to arbitration, the court is to settle the matter. But there is no such clause in the Inter-American Arbitration Treaty. For example, the Mexican government might have contended at the time of the American bombardment of Vera Cruz in 1914 that such bombardment involved a violation of international law. On the other hand, the United States might have contended that no international law had been formulated in regard to this type of self-help and that therefore the dispute was not suitable for arbitration. Although under the optional clause of the World Court such a difference would be settled by the court itself, under the Inter-American Arbitration Treaty each government is permitted to adhere to its original position, thus preventing arbitration. In border-line cases the arbitration court may possibly pass on this question of jurisdiction through its power to formulate a *compromis*, after three months.[32] Nevertheless one party to a dispute may still decline to arbitrate before the *compromis* stage is reached, on the ground that the dispute does not fall within the justiciable categories.

Unlike the Root treaties and the Kellogg treaties, which specified the Hague Court as the tribunal to which controversies should be referred, the Inter-American Arbitration Treaty permits the parties to agree on any type of court or tribunal. Under the provisions of Article 3, disputes may be referred to the Permanent Court of International Justice or elsewhere. In practice there should be little difficulty in agreeing on a court. The World Court offers many advantages, owing to the fact that it is composed of eleven jurists of the highest international standing, who hold regular sessions

30. *Ibid.*, p. 604.

31. "Pan-American Peace," *Yale Review*, Summer, 1929.

32. Cf. p. 321.

at the Hague. Should the parties be unable to agree on a tribunal, however, provision is made for selection of a special court. In the first instance each party nominates two arbitrators, only one of whom may be a national of the nominating State, and these four select the fifth arbitrator. Should they fail to agree on a fifth member, the choice is to be made by two non-American members of the Permanent Court of Arbitration at the Hague, one of whom is nominated by each party. The method defined in Article 3 has been criticized as being somewhat cumbersome, but it was designed to eliminate any political influence in selecting the important fifth arbitrator or umpire.

DEFINING THE ISSUE

Article 4 of the arbitration treaty embodies the usual *compromis* clause, providing that in each case the parties to the dispute shall formulate a special agreement which shall clearly define the subject matter of the controversy, the seat of the court, the rules to be observed and other conditions. A similar provision is found in the majority of general arbitration treaties and is included in order that the parties may define precisely the points which they wish the arbitrator to decide. No provision is made for reference of the special agreement to legislative bodies for ratification. In the past the United States Senate has always insisted that this special agreement be submitted to it for advice and consent in ratification, as though the *compromis* were a formal treaty. The position of the Senate in regard to the *compromis* in cases coming under the Inter-American Arbitration Treaty will be reviewed in a later section of this report.[33]

The final paragraph of Article 4 recognizes the possibility that the parties may fail to agree on a *compromis* and provides in this contingency that if an accord has not been reached on the *compromis* within three months from the time the court is established, the agreement is to be formulated by the court. A somewhat similar provision in the arbitration treaties with France and Great Britain, negotiated during the Taft administration, was opposed by the Senate, and the treaties were rejected.[34] In this case the treaties gave a commission of inquiry the right to determine whether a question was justiciable. The Senate argued that such authority could not be delegated to any international body.

Article 7 of the treaty provides that the award of the court is to be final, and "settles the dispute definitively and without appeal." Differences arising over interpretation of the award must be submitted to the court itself.

The treaty is to remain in force indefinitely, but may be denounced on a year's notice, at the end of which period it shall cease to be in force as regards the party which denounced it.

RESERVATIONS TO THE TREATY

Seven countries, including the United States, signed the arbitration treaty without any reservations,[35] while thirteen attached reservations of varying importance. Although phrased in different language, many of these reservations excepted from arbitration disputes of the same general character. Thus ten of the thirteen delegations making reservations excepted disputes arising from cases in which the national courts are competent, except where there has been a denial of justice.[36] As a general rule under international law, foreigners are required to exhaust local remedies before appealing to their own government for relief. Theoretically, therefore, this reservation seems unnecessary. Latin American States, however, have frequently suffered from intervention resulting from claims of foreigners who have not actually exhausted legal remedies, but who have successfully contended that local remedies are no more than a travesty on justice.[37] They regard this reservation as essential to assure their national sovereignty and the independence of their courts in cases involving nationals of stronger powers, particularly those of the United States.

Six countries expressly excepted all cases arising out of events or acts which took place

33. Cf. p. 322-24.

34. Cf. F. P. A. *Information Service*, Vol. III, No. 7, cited.

35. The United States, Brazil, Cuba, Haiti, Nicaragua, Panama and Peru.

36. Bolivia, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Mexico, Salvador and Venezuela.

37. Cf. F. P. A. *Information Service*, Vol. IV, No. 17, cited.

prior to the coming into force of the treaty.[38] This reservation excludes a great many important questions, as the majority of the most serious controversies have their roots in the past. This is particularly true in the case of boundary disputes, in which virtually every Latin American country has been involved at some time in its history. Bolivia, although it freely accepted the offer of conciliation in its boundary dispute with Paraguay, has reserved such disputes in general from arbitration. Nevertheless Bolivia apparently indicated a willingness to arbitrate this type of dispute when it made another reservation to the effect that in territorial controversies the zone to which arbitration should apply must be previously determined in the arbitration agreement. Paraguay made no reservation affecting disputes antedating the treaty, but excepted all questions affecting the integrity of its national territory.

These two categories include virtually all of the reservations made by the delegations at the time of signing. One delegation—that of Salvador—excluded all domestic questions, eliminating even the phrase "and are not controlled by international law."

WITHDRAWAL OF RESERVATIONS

Under the terms of the unique Protocol of Progressive Arbitration, each of these reservations may be withdrawn by the State attaching it to the treaty, and the two general exceptions in the body of the treaty may likewise be abandoned. Article 1 of the protocol provides that the parties may at any time deposit with the Department of State of the United States an appropriate instrument evidencing that it has abandoned any or all of the reservations.

The wide scope of this Inter-American Arbitration Treaty is apparent from the foregoing survey of its provisions. If ratified by all of the American republics it will constitute a material advance over previous treaties in force between the American republics.

ARBITRATION AND THE UNITED STATES SENATE

The arbitration policy of the United States has been shaped and in large measure dictated by the Senate under its authority to amend or modify agreements entered into by the Executive. While the Executive has shown a readiness to negotiate various types of compulsory arbitration treaties during the past thirty years, the Senate has insisted on reservations whose adoption has limited the scope of the original agreements.

No difference of opinion between the Executive and the Senate has been more important than that which concerns the submission of the *compromis* clause to the Senate. The Senate has taken the position that before resorting to arbitration in any controversy with a foreign power, the special agreement—defining the terms of reference, the subject matter in dispute and the powers of the court—shall be referred to it for advice and consent in ratification.

The Executive, while not contesting the right of the Senate to approve the *compromis* in each case, has argued that this procedure in effect nullifies the pledge to arbitrate contained in the general treaty, inasmuch as the character of the Senate amendments may be such as to exclude from arbitration questions deemed suitable under the general treaty.

When the arbitration treaty of 1897 with Great Britain was sent to the Senate, that body inserted amendments requiring submission of the *compromis* to itself in each case;[39] the treaty was then rejected by the President. When the Senate inserted a similar amendment in the arbitration treaties concluded with a number of European countries in 1904-1905, President Roosevelt withdrew the treaties and refused to put them into force, explaining in a letter to Senator Lodge that in his opinion the amendments made the treaties "shams." In effect, he said, it meant that each of the so-called arbitration treaties solemnly declare that there should be another arbitration treaty whenever the two governments decide there

38. Bolivia, Chile, Colombia, Ecuador, Honduras and Salvador.

39. Cf. F. P. A. *Information Service*, Vol. III, No. 7, cited, for full discussion of the Senate's attitude; cf. also *Arbitration and the United States*, World Peace Foundation pamphlets, Vol. IX, Nos. 6-7.

should be one.[40] He did not propose that the United States should be a party to such treaties. Succeeding administrations, however, reversed the Roosevelt policy, and negotiated general arbitration treaties satisfactory to the Senate. Both the Root treaties and the Kellogg treaties provided that the *compromis* must be referred to the Senate for advice and consent in ratification.

THE SENATE AS A CHECK ON THE EXECUTIVE

Various reasons have been advanced by the Senate in support of its attitude. While admitting that it may have a "moral" obligation to ratify the *compromis*, the Senate has steadfastly maintained its right to pass on the terms of the special agreement. The minority report on the treaties of 1904-1905 stated:

> "The firm grasp upon our relations with foreign governments, placed in the hands of a minority of one-third of the Senate by the Constitution, whereby entangling alliances have often been prevented . . . is silently passing into the sole and exclusive power of the President.
>
> "This fatal door in these conventions, through which the rightful powers of the Senate will pass into the hands of the Executive, should be closed so that a mere diplomatic agreement concluded by the President cannot bind the Government of the United States. . . . Our Government will become a true autocracy when the President is invested with this power."[41]

PREROGATIVES OF THE EXECUTIVE

Despite the fear thus expressed by the Senate, the President has been permitted to negotiate a large number of agreements with the binding character of treaties in the name of the government of the United States, without submitting them to the Senate. More than fifty such agreements have been concluded in the past twenty years. These may be grouped under three general heads:

1. Agreements with foreign countries concluded by the Executive under the general authority conferred by a previous act of Congress.
2. Agreements concluded by the Executive and based on provisions of a previous treaty.
3. Agreements or arrangements concluded by the Executive, usually by an exchange of notes, not based on a previous treaty or authorized by an act of Congress.

International agreements falling in the first group include a series of preliminary agreements according mutual and unconditional most-favored-nation treatment signed with Poland, Czechoslovakia, Greece, Finland, Estonia, Latvia, Haiti, Guatemala, Nicaragua and other countries between 1923 and 1925.[42] These agreements were effected by exchange of notes and although not submitted to the Senate were in accord with the principle of the tariff law.

Because of obligations expressed or implied in previous treaties, the President or the Secretary of State has negotiated a number of agreements providing for the establishment of claims commissions, or for extending the duration of commissions already established.[43]

Many far-reaching agreements, which are not based on the provisions of an earlier treaty, nor under authority of an act of Congress, have been concluded in the past few years by the Executive without submission to the Senate. Among these may be mentioned the arrangement between the United States and Great Britain for the disposal of pecuniary claims arising out of the World War—concluded by an exchange of notes signed May 19, 1927.[44] The Lansing-Ishii agreement of November 2, 1917 with Japan and the arrangement cancelling the agreement signed April 14, 1923,[45] and the arrangement between the United States and Canada relating to assignment of high frequencies of radio stations on the North American continent, signed February 26 and 28, 1929[46] were likewise effective without submission to the Senate.

Many other similar agreements might be cited; these are sufficient, however, to indicate that the Senate has permitted the Executive a considerable amount of freedom in negotiating agreements with other coun-

40. *Ibid.*, p. 92.
41. Senate Document No. 115, 58th Congress, 3rd Session.
42. U. S., Department of State, *Treaty Series*, Nos. 727, 673a, 740, 706, 722, 715, 746, 733, 700, 672, etc.
43. Among those more recently negotiated are the agreements between the United States and Germany, concluded August 10, 1922, providing for a Mixed Commission to determine the amount to be paid by Germany in satisfaction of obligations assumed in the treaty of peace with the United States (Malloy, cited, Vol. III, p. 2601). A similar Mixed Commission was established by virtue of an agreement with Austria and Hungary, on August 24 and August 29, 1921 (U. S., Department of State, *Treaty Series*, No. 730).
44. U. S., Department of State, *Treaty Series*, No. 756.
45. *Ibid.*, No. 667.
46. *Ibid.*, No. 777a.

tries. In fact, it has been argued that the discretion allowed the President in many of these cases greatly exceeds that which he would enjoy if he were allowed to negotiate a *compromis*, or special agreement under a general arbitration treaty. Moreover, it is suggested that the Senate would not be departing from a practice to which it has already given its tacit approval should it permit the Executive to negotiate the *compromis* without the consent of the Senate.

PRECEDENTS FOR EXECUTIVE ACTION

A provision similar to the *compromis* clause of arbitration treaties is found in Article 2 of the conciliation treaty of 1923 between the United States and the five Central American republics. This article provides that in each case where a commission of inquiry has been set up, the parties in dispute "shall by common accord draw up a protocol in which shall be stated the question or questions of fact which it is desired to elucidate." Furthermore, the article provides that if the interested parties are unable to reach an agreement on the protocol, the commission "may proceed with the investigation, taking as a basis the diplomatic correspondence upon the matter which has passed between the parties."[47]

Despite the fact that the treaty makes no provision for referring the special protocol to legislative bodies, and gives the commission authority to proceed in the absence of an agreement, the United States Senate ratified this treaty without amendment or reservation.[48]

In the series of treaties for the prevention of smuggling of intoxicating liquors concluded by the United States with Great Britain, France, Germany and other countries between 1924 and 1928, provision was made for the arbitration of claims arising from the boarding of private vessels by the authorities of the United States outside the limits of territorial waters.[49] No provision for submitting a special agreement or *compromis* to the Senate was embodied in the treaties. It is interesting to note, therefore, that in the case of the Canadian vessel, *I'm Alone*, which was sunk in the Gulf of Mexico by a United States Coast Guard cutter in March 1929, the State Department has not been required to submit the *compromis* to the Senate. The framing of the *compromis* in this case has been especially important in view of the far-reaching questions of international law involved in the case.

Aside from the possibility that the *compromis* may be mutilated or rejected outright by the legislative branch,[50] one of the principal objections raised in the United States against submitting it to the Senate in each case is the unnecessary delay which would occur when the Senate is not in session. The process of arbitration is already cumbersome, and it is argued that submission to the Senate only adds an additional and unnecessary step. Of the arbitration treaties registered with the League of Nations only two require reference to a legislature—and to both of these the United States is a party.

When the Inter-American Arbitration Treaty comes before the Senate, the debate on this and other provisions will be followed with attention and interest throughout the United States.

47. *Ibid.*, No. 707.

48. *Congressional Record*, March 18, 1924.

49. U. S., Department of State, *Treaty Series*, Nos. 685, 693, 698, etc.

50. Secretary Kellogg stated in 1928 that he could not recall a single case where the Senate had refused a special agreement of arbitration.

APPENDIX

GENERAL TREATY OF INTER-AMERICAN ARBITRATION*

In accordance with the solemn declarations made at said conference† to the effect that the American Republics condemn war as an instrument of national policy and adopt obligatory arbitration as the means for the settlement of their international differences of a juridical character;

Being convinced that the Republics of the New World, governed by the principles, institutions and practices of democracy and bound furthermore by mutual interests, which are increasing each day, have not only the necessity but also the duty of avoiding the disturbance of continental harmony whenever differences which are susceptible of judicial decision arise among them;

Conscious of the great moral and material benefits which peace offers to humanity and that the sentiment and opinion of America demand, without delay, the organization of an arbitral system which shall strengthen the permanent reign of justice and law;

And animated by the purpose of giving conventional form to these postulates and aspirations with the minimum exceptions which they have considered indispensable to safeguard the independence and sovereignty of the states and in the most ample manner possible under present international conditions, have resolved to effect the present treaty, and for that purpose have designated the plenipotentiaries hereinafter named:

[Here follow the names of the same plenipotentiaries as in the Protocol of Progressive Arbitration (see p. 326).]

Who, after having deposited their full powers, found in good and due form by the conference, have agreed upon the following:

ARTICLE 1

The high contracting parties bind themselves to submit to arbitration all differences of an international character which have arisen or may arise between them by virtue of a claim of right made by one against the other under treaty or otherwise, which it has not been possible to adjust by diplomacy and which are juridical in their nature by reason of being susceptible of decision by the application of the principles of law.

There shall be considered as included among the questions of juridical character:

(a) The interpretation of a treaty;
(b) Any question of international law;
(c) The existence of any fact which, if established, would constitute a breach of an international obligation;
(d) The nature and extent of the reparation to be made for the breach of an international obligation.

The provisions of this treaty shall not preclude any of the parties, before resorting to arbitration, from having recourse to procedures of investigation and conciliation established in conventions then in force between them.

ARTICLE 2

There are excepted from the stipulations of this treaty the following controversies:

(a) Those which are within the domestic jurisdiction of any of the parties to the dispute and are not controlled by international law; and

(b) Those which affect the interest or refer to the action of a state not a party to this treaty.

ARTICLE 3

The arbitrator or tribunal who shall decide the controversy shall be designated by agreement of the parties.

In the absence of an agreement the following procedure shall be adopted:

Each party shall nominate two arbitrators, of whom only one may be a national of said party or selected from the persons whom said party has designated as members of the Permanent Court of Arbitration at The Hague. The other member may be of any other American nationality. These arbitrators shall in turn select a fifth arbitrator who shall be the president of the court.

Should the arbitrators be unable to reach an agreement among themselves for the selection of a fifth American arbitrator, or in lieu thereof, of another who is not, each party shall designate a non-American member of the Permanent Court of Arbitration at The Hague, and the two persons so designated shall select the fifth arbitrator, who may be of any nationality other than that of a party to the dispute.

ARTICLE 4

The parties to the dispute shall formulate by common accord, in each case, a special agreement which shall clearly define the particular subject-matter of the controversy, the seat of the court, the rules which will be observed in the proceedings, and the other conditions to which the parties may agree.

If an accord has not been reached with regard to the agreement within three months reckoned from the date of the installation of the court, the agreement shall be formulated by the court.

ARTICLE 5

In case of death, resignation or incapacity of one or more of the arbitrators the vacancy shall be filled in the same manner as the original appointment.

* "Official Documents," *American Journal of International Law*, April 1929, p. 82-90.

† The Conference on Conciliation and Arbitration assembled at Washington December 10, 1928.

ARTICLE 6

When there are more than two states directly interested in the same controversy, and the interests of two or more of them are similar, the state or states who are on the same side of the question may increase the number of arbitrators on the court, provided that in all cases the parties on each side of the controversy shall appoint an equal number of arbitrators. There shall also be a presiding arbitrator selected in the same manner as that provided in the last paragraph of Article 3, the parties on each side of the controversy being regarded as a single party for the purpose of making the designation therein described.

ARTICLE 7

The award, duly pronounced and notified to the parties, settles the dispute definitively and without appeal.

Differences which arise with regard to its interpretation or execution shall be submitted to the decision of the court which rendered the award.

ARTICLE 8

The reservations made by one of the high contracting parties shall have the effect that the other contracting parties are not bound with respect to the party making the reservations except to the same extent as that expressed therein.

ARTICLE 9

The present treaty shall be ratified by the high contracting parties in conformity with their respective constitutional procedures.

The original treaty and the instruments of ratification shall be deposited in the Department of State of the United States of America which shall give notice of the ratifications through diplomatic channels to the other signatory governments and the treaty shall enter into effect for the high contracting parties in the order that they deposit their ratifications.

This treaty shall remain in force indefinitely, but it may be denounced by means of one year's previous notice at the expiration of which it shall cease to be in force as regards the party denouncing the same, but shall remain in force as regards the other signatories. Notice of the denunciation shall be addressed to the Department of State of the United States of America which will transmit it for appropriate action to the other signatory governments.

Any American state not a signatory of this treaty may adhere to the same by transmitting the official instrument setting forth such adherence to the Department of State of the United States of America which will notify the other high contracting parties thereof in the manner heretofore mentioned.

In witness whereof the above mentioned plenipotentiaries have signed this treaty in English, Spanish, Portuguese, and French and hereunto affix their respective seals.

Done at the city of Washington, on this fifth day of January, 1929.

PROTOCOL OF PROGRESSIVE ARBITRATION

Whereas, a General Treaty of Inter-American Arbitration has this day been signed at Washington by plenipotentiaries of the Governments of Venezuela, Chile, Bolivia, Uruguay, Costa Rica, Peru, Honduras, Guatemala, Haiti, Ecuador, Colombia, Brazil, Panama, Paraguay, Nicaragua, Mexico, El Salvador, the Dominican Republic, Cuba, and the United States of America;

Whereas, that treaty by its terms excepts certain controversies from the stipulations thereof;

Whereas, by means of reservations attached to the treaty at the time of signing, ratifying or adhering, certain other controversies have been or may be also excepted from the stipulations of the treaty or reserved from the operation thereof;

Whereas, it is deemed desirable to establish a procedure whereby such exceptions or reservations may from time to time be abandoned in whole or in part by the parties to said treaty, thus progressively extending the field of arbitration;

The governments named above have agreed as follows:

ARTICLE 1

Any party to the General Treaty of Inter-American Arbitration signed at Washington the fifth day of January, 1929, may at any time deposit with the Department of State of the United States of America an appropriate instrument evidencing that it has abandoned in whole or in part the exceptions from arbitration stipulated in the said treaty or the reservation or reservations attached by it thereto.

ARTICLE 2

A certified copy of each instrument deposited with the Department of State of the United States of America pursuant to the provisions of Article 1 of this protocol shall be transmitted by the said Department through diplomatic channels to every other party to the above-mentioned General Treaty of Inter-American Arbitration.

In witness whereof the above-mentioned plenipotentiaries have signed this protocol in English, Spanish, Portuguese, and French and hereunto affix their respective seals.

Done at the city of Washington, on this fifth day of January, 1929.

[Here follow the signatures and seals of the same plenipotentiaries who signed the General Treaty of Inter-American Arbitration.]